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No. 02-1676

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *et al.*,

Appellants,

—v.—

SENATOR MITCH MCCONNELL, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF BROADCASTERS' MOTION TO AFFIRM DISTRICT COURT'S JUDGMENT AS TO SECTION 504 OF BCRA

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QUESTION PRESENTED

Whether this Court should summarily affirm so much of the district court's judgment as unanimously struck down section 504 of the Bipartisan Campaign Reform Act as violative of the First Amendment.

STATEMENT PURSUANT TO RULE 29.6

Appellee National Association of Broadcasters has no parent corporation and has issued no stock to the public.

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Appellee, the National Association of Broadcasters, hereby moves the Court for an Order summarily affirming so much of the district court's judgment as struck down Section 504 of the Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA") as violative of the First Amendment. Although the Executive Branch Appellants,[1] have broadly urged the Court to review *every* provision of BCRA that was invalidated by the district court, they have offered no credible argument as to why plenary review of the district court's unanimous decision striking down Section 504 is warranted. For the reasons set forth below, this Court should summarily affirm the district court's unanimous decision striking down Section 504 of BCRA.

STATEMENT OF THE CASE

The National Association of Broadcasters ("NAB") is a non-profit, incorporated trade association of radio and television stations and broadcasting networks. 10 PCS/JG002.[2] NAB serves and represents the American broadcasting industry and has approximately 7,300 members throughout the country. *Id.* All of NAB's voting members are broadcast licensees within the meaning of the Communications Act of 1934. *Id.* NAB members regularly broadcast a substantial number of advertise-

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[1] The Executive Branch Appellants are the Federal Election Commission and David W. Mason, Ellen L. Weintraub, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner, in their capacities as Commissioners of the FEC; John D. Ashcroft, in his capacity as Attorney General of the United States; the United States Department of Justice; the Federal Communications Commission; and the United States of America.

[2] References to "PCS" are to Plaintiffs' Consolidated Evidentiary Submission, filed with the district court on November 6, 2002.

ments taking positions on public issues, including ones on political matters of national interest and legislative issues of public importance. 10 PCS/JG003. Because NAB members are directly and adversely impacted by several provisions of BCRA they believe to be unconstitutional, shortly after the statute was enacted NAB instituted an action before the district court challenging those provisions, including Section 504.[3]

Section 504 of BCRA (amending § 315 of the Communications Act) compels all broadcasters to collect and publicly disclose records of any "request to purchase broadcast time" that "is made by or on behalf of a legally qualified candidate for public office" or that relates "to any political matter of national importance," including but not limited to communications relating to any "election to Federal office" or any "national legislative issue of public importance." Such records must include the acceptance or rejection of requests for advertisements; the name of the person making the requests and other contact information; a list of the chief executive officers or members of the executive committee or board of directors of the entity making the request; the date and time on which the communication is aired; the rate charged; the class of time purchased; and the issue to which the communication "refers." Section 504 thus requires broadcasters to obtain and disclose enormous detail about private citizens and groups who pay for political advertisements. Indeed, the statute goes so far

[3] On May 2, 2003 NAB filed its Jurisdictional Statement with the Court together with other parties in these related appeals (*see* Jurisdictional Statement in *McConnell* v. *Federal Election Commission*, No. 02-1674), seeking review of the district court's decision with respect to certain other provisions of BCRA. NAB believes that the questions presented there and the questions presented by the Executive Branch Appellants in this appeal (other than the constitutionality of section 504) merit plenary review by this Court.

as to require such disclosures where those citizens and groups merely *request* airtime, even if the airtime is never ultimately purchased.

NAB urged the district court to strike down Section 504 on the ground that the burdensome requirements imposed by the statute could not be sustained consistent with the First Amendment and served no legitimate governmental interest. NAB also argued that the statutory phrase "political matter of national importance" is unconstitutionally vague. In their effort to defend the statute below, the Executive Branch Appellants were left to urge that the record-keeping and disclosure provisions provided "important information" to the public about political campaigns and about the identity of groups seeking to air political advertisements. The government could identify no pressing problem—or indeed *any* problem at all—that could be said to justify the substantial intrusions imposed by Section 504.

Although the district court's four lengthy opinions are deeply fractured as to the constitutionality of many of BCRA's other provisions, the court's decision to strike down Section 504 was clear, unanimous and unequivocal. Section 504 could not stand, in the view of all three of the members of the lower court panel, because "the government lacks a constitutionally acceptable justification" to support its requirements. *See* Memorandum Opinion of Judge Leon at 114; Memorandum Opinion of Judge Kollar-Kotelly at 614 (agreeing with Judge Leon); *see also* Memorandum Opinion of Judge Henderson at 236-37. In fact, the district court found that the defendants "provided *no evidence* that Section 504 serves *any* of the government interests" that have been deemed sufficient to justify compelled disclosure of communications about federal candidates. *See* Memorandum Opinion of Judge Leon at 112 (emphasis added); Mem-

orandum Opinion of Judge Kollar-Kotelly at 614 (agreeing with Judge Leon); *see also* Memorandum Opinion of Judge Henderson at 236-37 (Section 504 does not "serve *any* of the three 'subordinating interests' mentioned in *Buckley*") (emphasis added). The court also concluded that Section 504's disclosure requirements for noncandidate-focused communications "are *even more* difficult to justify" and that "the defendants [ ] provided *no* evidence" that special interest groups posed a threat to justify the requirements of Section 504. *See* Memorandum Opinion of Judge Leon at 113-14 (emphasis added); Memorandum Opinion of Judge Kollar-Kotelly at 614 (agreeing with Judge Leon).[4]

In their Jurisdictional Statement, the Executive Branch Appellants have urged this Court to undertake plenary review of the district court's ruling as to Section 504. *See* Jurisdictional Statement at i. The Intervenor Appellants have not joined in that request. *See* Intervenor-Appellants' Jurisdictional Statement in *McCain v. McConnell* (No. 02-1702) at i.

ARGUMENT

There can be no serious dispute that the intrusive requirements imposed by Section 504 require the collection and disclosure of sweeping information about

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[4] Even before reaching the issue of whether the disclosure requirements of Section 504 could withstand "exacting scrutiny," Judge Henderson held that the statute was invalid because it failed the "express advocacy test" set forth in *Buckley* v. *Valeo*, 424 U.S. 1, 44 (1976). *See* Memorandum Opinion of Judge Henderson at 235 ("Many, if not most, communications 'relating to any political matter of national importance' do not contain words expressly advocating the election or defeat of a candidate. . . . Under *Buckley* these provisions are unconstitutionally overbroad unless they can reasonably be construed to apply only to express advocacy.")

those who choose to engage in core political speech, speech long-entitled to the fullest protections of the First Amendment. There can also be no serious dispute that the statute requires broadcasters nationwide to make the most sensitive of decisions about whether speech relates "to any political matter of national importance" or any "national legislative issue of public importance" and to risk severe sanctions if they are wrong in those determinations. These constitutionally suspect burdens cannot be imposed by the government in the absence of a substantial governmental interest. Yet, as the district court unanimously held, the recordkeeping and disclosure requirements of Section 504 fail to serve *any* legitimate governmental objective and, as such, violate the First Amendment.

During the course of this litigation, the Executive Branch Appellants have made various claims about the purported governmental interests supporting Section 504. First, in their response to contention interrogatories served by NAB, the Executive Branch Appellants (defendants at the time) claimed that Section 504 facilitates deterrence and detection of violations of the source-and-amount limitations on federal campaign contributions, informs the public of sources of support for candidates, and informs the public of sponsors of "electioneering communications." *See* 10 PCS/JG 206-07 (Response of United States and FCC to NAB's First Interrogatories, June 27, 2002). Later, presumably because those objectives could not possibly justify a statute requiring extensive disclosures not just about candidates but about issues of "national importance," the Executive Branch Appellants switched course and defended Section 504 on the ground that it would provide "public access to important information about political broadcasts," assist voters who have "difficulty identifying the true sponsors of issue ads," and combat "political corruption." *See*

Opening Brief of the United States and FCC at 218. Later still, the Executive Branch Appellants claimed that "public disclosure" is, in general, beneficial to the public and that it is useful to give the public "access to information" about requests made by individuals and groups who seek to purchase time (even if they do not) for advertising on television. *See* Opposition Brief of the United States and FCC at 134. Most recently, in their Jurisdictional Statement, the Executive Branch Appellants similarly claim that Section 504 "provides the public with access to information concerning the amounts that individuals and groups are prepared to spend to broadcast messages on political matters of national importance, as well as the sums actually spent on such broadcasts." *See* Executive Branch Appellants' Jurisdictional Statement at 29. The Executive Branch Appellants added that "[r]equiring disclosure of the identities of those who make requests, and the broadcasters' dispositions of the requests, also enables the public to evaluate whether broadcasters are processing requests in an evenhanded fashion." *Id.*

Nowhere in their Jurisdictional Statement, or in the record or briefs below, have the Executive Branch Appellants ever attempted to explain how such generalized interests satisfy the exacting scrutiny warranted by the First Amendment. Instead, the Executive Branch Appellants act as if compelled disclosure is presumptively valid as long as the public will theoretically benefit from the forced dissemination of information. That is plainly not the case. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Court held that laws compelling disclosure of campaign information must be reviewed under "exacting scrutiny." *Id.* at 64. To survive such scrutiny, the governmental interest in disclosure must be "substantial," *id.* at 80, and "sufficiently important to outweigh the possibility of infringement" of First Amendment rights.

Id. at 66. Likewise, as noted above, compelled disclosure of information about "noncandidate-focused communications" is, in the words of the district court, "even more difficult to justify." *See* Leon Memorandum Opinion at 113 (*citing Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999)); Memorandum Opinion of Judge Kollar-Kotelly at 614 (agreeing with Judge Leon). As the Court of Appeals held in *Buckley*, "the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes." *Buckley v. Valeo*, 519 F.2d 821, 873 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976).

Whatever tangential and unproven benefits the public might receive from knowing the "amounts that individuals and groups are prepared to spend to broadcast messages" or in learning whether broadcasters air advertisements in an "evenhanded" way, they surely cannot justify such deep intrusions into the rights of broadcasters and political speakers. This is particularly true where, as here, the record offers *no evidence* justifying the need for these purported benefits. *See* Memorandum Opinion of Judge Leon at 113-114 (finding that there is "no evidence suggesting, let alone proving, that purchasers have evaded, or will evade, [existing] disclosure requirements;" that "there is nothing in the record which demonstrates that broadcast licensees" have failed to act in an "even-handed fashion;" and that there is "no evidence" that special interest groups posed a threat justifying the requirements of Section 504); Memorandum Opinion of Judge Kollar-Kotelly at 614 (agreeing with Judge Leon).

Section 504 plainly fails to advance *any* discernible statutory or regulatory objective. There is no law, for instance (including BCRA itself), that prohibits adver-

tisers from inquiring of a broadcaster as to the availability of airtime. Nor is there a law (including BCRA itself) that limits the amount of speech on issues of national importance in which a speaker may engage. There is also no law (including BCRA itself) that requires broadcasters to ensure that the political advertisements they air are "even-handed" whether alone or in their totality. Section 504 thus differs fundamentally from the disclosure requirements already imposed on broadcasters by the FCC, *see* 47 C.F.R. §§ 73.1940-73.1944, which are closely tied to the enforcement of specific statutory provisions relating to legally qualified candidates. *See e.g.* 47 U.S.C. § 315(a) (requiring broadcasters to provide equal opportunities for candidates); 47 U.S.C. § 315(b) (requiring broadcasters to provide the lowest unit charge for candidates); 47 U.S.C. § 312(a)(7) (requiring reasonable access for federal candidates). Even in *Buckley*, the provisions of FECA requiring disclosure were upheld by the Court precisely because they were related to the goals of the statute and provided the means for enforcing specific statutory commands. *Buckley*, 424 U.S. at 68.

Beyond failing to advance any legitimate governmental interests, Section 504 imposes a wealth of burdensome and invasive requirements upon broadcasters and political speakers alike. Section 504 would "materially add to the amount of records NAB members must maintain," Memorandum Opinion of Judge Henderson, at 107, and, moreover, would force disclosure to the government of the names of individuals and groups engaged in advocacy about important, often controversial, social and political issues. That kind of forced disclosure is particularly intolerable under the First Amendment, especially where, as here, it is thoroughly unconnected to any valid governmental interest. *See N.A.A.C.P. v. State of Alabama*, 357 U.S. 449, 462

(1958) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . a restraint on freedom of association . . . ."). Indeed, Judges Leon and Kollar-Kotelly specifically found that Section 504 constitutes "an onerous collection and disclosure system on broadcast licensees; infringes the associational rights of groups and their members who engage in broadcasting; and potentially curtails political speech invaluable to an informed electorate." *See* Memorandum Opinion of Judge Leon at 114; Memorandum Opinion of Judge Kollar-Kotelly at 614 (agreeing with Judge Leon); *see also* Memorandum Opinion of Judge Henderson at 235-36.

Section 504 not only fails "exacting scrutiny," but also suffers from unconstitutional vagueness because its application may turn on one wholly ambiguous phrase. As noted above, the recordkeeping and disclosure requirements of Section 504 are triggered whenever broadcasters receive a request to air advertisements that relate "to any political matter of national importance." Judges Leon and Kollar-Kotelly, referring to this phrase, recognized that "the scope of [Section 504's] required disclosures is unclear because of the language's vagueness." *See* Memorandum Opinion of Judge Leon at 113, n.141; Memorandum Opinion of Judge Kollar-Kotelly at 614 (agreeing with Judge Leon). Likewise, Judge Henderson found that Section 504 "requires the personnel at NAB member stations to make what will often be a difficult and sensitive decision about whether a particular communication relates to a 'political matter of national importance,' a decision for which station sales personnel are not trained." *See* Memorandum Opinion of Judge Henderson at 107. Judge Henderson also found that "NAB members are likely to have difficulty discerning whether a particular communication relates to a 'political matter of national importance' and are therefore

likely to have difficulty discerning whether and under what circumstances recordkeeping and disclosure are required." *Id.* NAB members' inability to determine when the disclosure requirements of Section 504 will apply is particularly troublesome because a violation of the provision will subject broadcasters to substantial fines and/or burdensome inquiries from the FCC. Such vagueness is plainly intolerable under both the First Amendment and the Due Process Clause of the Fifth Amendment. *See e.g., Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); *Trinity Broadcasting of Florida, Inc.* v. *FCC*, 211 F.3d 618, 629, 631 (D.C. Cir. 2000) (vacating denial of broadcast license because regulation was "confus[ing]," "unclear," and failed to provide "fair notice" to broadcaster).

The Executive Branch Appellants (as well as certain other parties) assert that in the interest of expedience, this Court should note probable jurisdiction and schedule further briefing and argument on *every* issue considered by the district court. *See* Motion of the Appellees/ Cross-Appellants Federal Election Commission, et al. for Expedited Briefing Schedule, filed May 23, 2003 at 1. It is not at all clear how a determination *not* to engage in plenary review of a particular provision so plainly (and unanimously held) unconstitutional as Section 504 would *hinder* this Court's expedited review of the district court's decision. Instead, by taking Section 504 off the table at this early stage, the Court will only advance the quick resolution of this otherwise complex appeal.

Moreover, any argument that Section 504 should for some reason be treated in conjunction with the rest of BCRA is belied by the fact that the provision is barely related to, and in fact stands far apart from, the complex set of requirements contained in the rest of BCRA. Unlike the soft money rules of Title I and the ban on

so-called "electioneering communications" in Title II, Section 504 only applies to broadcasters and imposes no requirements on candidates, political parties, interest groups, labor unions or other corporations.[5]

As the district court made plain, Section 504 represents a broad and aimless infringement of the rights of broadcasters and political speakers alike. Because the district court's unanimous decision to strike down Section 504 was clearly correct, it is not only reasonable, but also prudent for this Court to conclude that the provision does not warrant further plenary review.

[5] As Judges Leon and Kollar-Kotelly observed, "Section 504 is different from the other disclosure provisions in BCRA in two important ways: (1) broadcast licensees, not the purchasers, are required to make the disclosures; and (2) the disclosures are required for broadcasts on 'political matters of national importance' as well as on federal candidates." *See* Memorandum Opinion of Judge Leon at 112; Memorandum Opinion of Judge Kollar-Kotelly at 614 (agreeing with Judge Leon); *see also* Memorandum Opinion of Judge Kollar-Kotelly at 11 (describing Section 504 as "not central to [BCRA's] core mission").

CONCLUSION

For the foregoing reasons, the Court should issue an Order summarily affirming so much of the district court's judgment as struck down Section 504 of BCRA as violative of the First Amendment.

Dated: June 2, 2003

Respectfully submitted,

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